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SUPREME COURT, U.S.

NO. 83-6211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WESLEY ERIC HARRIS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court erred by failing to sustain Petitioner's motion to dismiss the prosecution after Petitioner made a prima facie, unrebutted showing that prosecutors in Harris County, Texas systematically exclude prospective black jurors from service through the exercise of peremptory challenges in virtually all cases involving the credibility of a white complainant versus that of a black defendant.

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Petitioner Wesley Eric Harris respectfully prays that a writ of certiorari issue to review an opinion and judgment of the Court of Criminal Appeals of Texas, which affirmed Petitioner's conviction for the alleged offense of sexual abuse and sentence to imprisonment for 12 years.

THE OPINION BELOW

The opinion of the Court of Criminal Appeals is not yet reported and is reproduced as an Appendix to this petition at page A-1.

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of Texas were entered on October 19, 1983. Leave to file a timely motion for rehearing was denied by that Court on December 7, 1983.

Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. section 1257(3). Filing of this petition was accomplished within 60 days of the order of the Court of Criminal Appeals denying the motion for rehearing and was therefore timely under Rules 20.1 and 20.4 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's Federal constitutional claims arise under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner, a black man with no previous criminal history, was indicted in 1979 by a grand jury in Harris County (Houston), Texas for the alleged offense of sexual abuse. The indictment alleged in substance that on or about May 29, 1979 Petitioner had "unlawfully, with intent to arouse sexual desire and by force and threats to and without the consent of MARILYN LACEY, a person not his spouse and hereafter styled the Complainant, have deviate sexual intercourse with the Complainant by placing his penis in the mouth of the Complainant" (R. 13).

A second count of the indictment, arising from the same alleged incident and alleging in substance that Petitioner had deviate sexual intercourse with the complainant "by placing his penis in the anus of the Complainant," was

abandoned by the State at the close of the evidence, the State electing to proceed on the first count alone (R. 895).

The complainant, Marilyn Lacey, a white woman, identified Petitioner as the man who allegedly attacked her in the parking lot of her apartment project late on the night of May 28, 1979; dragged her inside a gate of one of the apartments, and compelled her to submit to oral and anal sexual acts (R. 472-83). Petitioner, testifying on his own behalf, denied that he had attacked the complainant but maintained that at the time of the alleged occurrence he was preparing to go to work after returning from a day-long fishing trip with members of his family and his girlfriend (R. 1349-55).

No fingerprints or other physical evidence linked Petitioner to the alleged assault. There was no independent corroborative evidence of Petitioner's presence at the scene or involvement in the alleged offense. No other testimony implicated him. The case thus resolved itself into a credibility choice between the eye-witness identification testimony of the white complainant versus the sworn denial of the black defendant.

As the result of the prosecution's strategic utilization of its peremptory challenges, all 12 members of the jury were white. That jury returned a verdict finding Petitioner guilty of the alleged offense (R. 48). After overruling Petitioner's timely motion for new trial (R. 59), the Trial Judge sentenced him to imprisonment for 12 years.

After the jury which ultimately convicted Petitioner was empaneled, but before the commencement of testimony, Petitioner through his trial counsel filed a motion to dismiss the prosecution on the grounds that "the State of Texas through its prosecutorial officials has systematically excluded all of the black persons from the jury panel in this

cause and in other cases as part of a pattern and practice through the exercise of its peremptory challenges" (R. 38). Petitioner's trial counsel thereafter introduced extensive evidence establishing that, in virtually every criminal prosecution in Harris County, Texas in which the credibility of a white complaining witness was pitted against a black defendant, the prosecution historically had utilized its peremptory challenges to systematically exclude from jury service all black prospective jurors. Such evidence included the following testimony:

(1) Wesley Hocker, a criminal defense attorney, testified that in more than one hundred criminal jury trials in which he had participated since 1971 approximately 15 per cent involved a white complainant versus a black defendant; that in each of those cases the prosecution utilized its peremptory challenges to eliminate prospective black jurors who were on the panels, and that such practice was "the general rule" among prosecutors in Harris County (R. 1050-53);

(2) Judge Miron Love, a District Judge who had tried from 1,500 to 2,000 felony jury trials in Harris County since 1958, testified that "many" of those trials had involved white complainants and black defendants and that in "most of those cases" the prosecution "would eliminate most of the black jurors" through the exercise of peremptory challenges (R. 1045-47);

(3) Judge Joseph Guarino, a District Judge in Harris County, testified that in 28 years as a Harris County Assistant District Attorney, County Criminal Court Judge and District Court Judge, he could not recall a single instance in which a black sat on a petit jury in a criminal case in which the complainant was white and the defendant black (R. 1073-76);

(4) Veronica E. Morgan, a black Harris County Assistant District Attorney, testified that over a four-year period she had been assigned to four different District Courts and that in cases in which the complainant was white and the defendant black the "ultimate result" was an all-white jury as the result of the prosecution's exercise of its peremptory challenges (R. 1116-1121);

(5) Jacquelyn Miles, a court reporter, testified that over the preceding four-year period she had transcribed testimony in forty to fifty felony criminal cases; that approximately half of those cases involved a white complainant and a black defendant, and that she could not recollect a single case in which a prospective black juror had been empaneled as a juror (R. 1135-40);

(6) Craig Washington, a criminal defense attorney, testified that over a nine-year period he had tried approximately 237 jury trials in Harris County, Texas; that approximately 60 per cent of those cases were criminal cases in which the complaining witness was white and the defendant black; that in only two of such cases were blacks ultimately empaneled as jurors and that in each of those cases the number of black veniremen exceeded the number of peremptory challenges available to the prosecution; and that in the remainder of such cases no blacks had served on the jury, although blacks had been members of the panel of prospective jurors (R. 1143-48);

(7) Benjamin John Durant, an attorney who had formerly served as an intern with the Harris County District Attorney's Office, testified that one of the prosecutors participating in jury selection in Petitioner's case had also assisted in selecting a jury in a previous case involving a white complainant and a black defendant and that all eight blacks on the panel of prospective jurors in that case had

been excluded through exercise of the State's peremptory challenges (R. 1169-72);

(8) Andrew L. Jefferson, Jr., Petitioner's attorney and a former District Judge presiding in criminal cases in Harris County, testified that in approximately 20 to 30 felony trials in which he had presided during the period January 1974 to October 1975 more than one-half involved white complainants and black defendants; that he had made a "studied effort" to observe the utilization by the State of its peremptory challenges in such cases, and that in every case except one the State had utilized its peremptory challenges to exclude prospective black jurors, resulting in all-white juries in such cases; that he had continued to observe the jury selection process in similar cases since entering the private practice of law, and that since October 1975 the State had continued to "regularly and systematically" exclude blacks from such cases (R. 1178-80);

(9) Jim Skelton, an attorney who had previously served as a Harris County Assistant District Attorney from October 1969 to January 1973, testified that during such period he had participated in the trial of more than 200 jury cases; that the rule of thumb used in such cases was to peremptorily strike blacks from the panel of prospective jurors when the accused was black, and that there was "no question" that blacks had been and thereafter continued to be systematically excluded from juries in cases involving black defendants (R. 1789-1804).

The State countered with the testimony of several Assistant District Attorneys to the effect that they frequently exercised peremptory challenges to exclude prospective black jurors for reasons other than their race (R. 1063; 1108; 1111), and with the testimony of a black

District Judge to the effect that he had not previously observed any instance in which prospective black jurors were excluded by the State simply because they were black (R. 1131).

On appeal the Court of Criminal Appeals of Texas affirmed the conviction, holding that "the State effectively rebutted the [Petitioner's] prima facie case and that the evidence, viewed in toto, is conflicting on [the issue of racially motivated peremptory challenges]" (Opinion at p. 6). Essentially the Court of Criminal Appeals concluded that, "[a]s trier of fact, the trial court was entitled to resolve the conflicting evidence against the [Petitioner]" (Opinion at p. 7).

There was, however, no evidentiary conflict. The evidence introduced by Petitioner established a prima facie case that prosecutors in Harris County, Texas had systematically excluded prospective black jurors from jury service through the exercise of peremptory challenges in virtually all cases involving the credibility of a white complainant versus that of a black defendant. No prosecution witness denied that fact; and in that respect Petitioner's evidence was totally unrebutted.

REASONS FOR GRANTING THE WRIT

This Court must eventually reconsider the decision in Swain v. Alabama, 380 U.S. 202 (1965). This case should serve as the vehicle for that reconsideration.

As this Court held in Taylor v. Louisiana, 419 U.S. 522, 528 (1975), the "unmistakable import" of every Supreme Court decision since Smith v. Texas, 311 U.S. 128 (1940) "is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." "These principles

compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." Peters v. Kiff, 407 U.S. 493, 502 (1972). "The exclusion of Negroes from jury service because of their race * * * contravenes the very idea of a jury * * *." Carter v. Green County, 396 U.S. 320, 330 (1970).

Of course, the mere utilization of peremptory challenges by the prosecution to exclude all prospective black jurors in a particular case does not, in and of itself, constitute a violation of a black defendant's Federal constitutional rights, nor does it compel an inference in a particular case that the accused has been deprived of his Sixth Amendment right to be tried by a jury drawn from a cross-section of his community. This was essentially the holding in Swain:

> "The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome * * * by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it." 380 U.S. at 222 (emphasis added).

However, as expressly pointed out in Section III of the Court's opinion in Swain:

> "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. * * * In these circumstances, giving even the widest leeway to the operation of irrational but

> trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify." 380 U.S. at 223-24 (emphasis added).

This does not imply, of course, that systematic exclusion of black veniremen through the State's exercise of its peremptory challenges can be established only through proof that all blacks have thereby been excluded from jury service (even, for example, in cases in which blacks have served only because the number of blacks on the panel of prospective jurors exceeded the number of peremptory challenges available to the prosecution). This is made clear in the three "systematic exclusion" cases cited by Swain: Hernandez v. Texas, 347 U.S. 475 (1954); Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947).

In short, under Swain the accused "must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." Swain v. Alabama, 380 U.S. at 227. Proof that qualified blacks have appeared on panels of prospective jurors in Harris County over an extended period of time, coupled with proof that virtually none has ever served in a case involving the credibility of a white complainant versus that of a black defendant, and that such exclusion from service has resulted from the exercise of the prosecution's peremptory challenges, constitutes a prima facie case of systematic exclusion, Hernandez v. Texas, 347 U.S. at 480, thereby shifting the burden of persuasion to the prosecution to explain, justify

or account for such disproportionate exclusion of a particular class of jurors.

Of course, "a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State." Swain v. Alabama, 380 U.S. at 227 (emphasis added). In the present case, however, the evidence is clear and uncontradicted that the failure of blacks in Harris County to sit as jurors in criminal cases involving white complainants and black defendants is directly the consequence of the State's exercise of its peremptory challenges to exclude them. No State's witness testified otherwise. There is literally no evidence in the record to rebut the prima facie case Petitioner has established.

The State in the Trial Court did attempt to show that the Harris County District Attorney's Office had no express or implied policy of utilizing peremptory challenges to strike jurors in cases involving white complainants and black defendants. That circumstance, even if proven, is totally beside the point in view of Swain's explicit holding that "a defendant attacking the prosecutor's use of peremptory challenges over a period of time need [not] elicit an admission from the prosecutor that discrimination accounted for his rejection of Negroes, any more than a defendant attacking jury selection need obtain such an admission from the jury commissioners." 380 U.S. at 227.

The State at trial also attempted to show that its exclusion of prospective black jurors in this case was attributable to motives, purposes or objectives other than the race of such jurors. Again, however, once a prima facie case of systematic exclusion of prospective jurors on the basis of the race has been established, that case cannot be

rebutted merely by self-serving disclaimers. "If, in the presence of such testimony as defendant adduced, the mere general assertions of officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision -- adopted with special reference to their protection -- would be but a vain and illusory requirement." Norris v. Alabama, 294 U.S. at 598.

Finally, the most obvious distinction between the present case and Swain v. Alabama is that there was literally no evidence in Swain "of what the prosecution did or did not do on its own account in any cases other than the one at bar." 380 U.S. at 225. In the present case, by contrast, Petitioner has presented overwhelming evidence that as a matter of historical fact prosecutors in Harris County have traditionally utilized their peremptory challenges to exclude prospective black jurors in cases involving a white complainant and a black defendant, and that virtually no black jurors have ever sat in such cases except through the purely fortuitous circumstance arising when the number of prospective black jurors on the panel exceeds the number of peremptory challenges available to the prosecution.

Significantly, the claim presented to the Court in the present case is considerably narrower than the contention that blacks have been systematically excluded from juries trying black defendants in felony cases in Harris County. Rather, the contention is that black defendants tried by white prosecutors in Harris County felony prosecutions involving white complainants have been tried by all-white juries, resulting from the prosecution's systematic utilization of peremptory challenges to exclude prospective qualified black jurors. The evidence in the record overwhelmingly establishes that proposition.

It is clear beyond doubt that Petitioner's proof established a prima facie case of systematic, racially motivated peremptory challenges in Harris County under the standards prescribed by Norris v. Alabama, 294 U.S. 587 (1935) and Hernandez v. Texas, 347 U.S. 475 (1954) for proving racially motivated exclusion from jury service. The State responded with testimony that is qualitatively indistinguishable from that before the Supreme Court in Hernandez:

> "To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin American descent in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the [defendant's] case. As the [Supreme] Court said in Norris v. Alabama:
>
> > 'That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion negroes from jury service, the constitutional provisions . . . would be but a vain and illusory requirement.'
>
> The same reasoning is applicable to these facts."

347 U.S. at 481-82 (emphasis added; footnote omitted).

Nor is it significant, as the Court of Criminal Appeals implied, that not all blacks have been excluded from jury service in every case. There is simply no record evidence that blacks who may have served in cases such as that now before the Court served as a result of a racially non-discriminatory policy adopted by prosecutors in Harris County. Nothing excludes the hypothesis, eminently reasonable in these circumstances, that blacks have served in cases such as this only because the number of blacks on the panel of prospective jurors exceeded the number of peremptory

challenges available to the prosecution. Thus, the testimony of Judge Love and Judge Routt was beside the point; clearly neither of these witnesses had any personal or direct knowledge of the motivations, purposes or reasons underlying the exercise of peremptory challenges by prosecutors in cases generally or in this case in particular. Equally irrelevant was the testimony of present and former prosecutors regarding the alleged absence of any express or implied "policy" of utilizing peremptory challenges to strike jurors in cases involving white complainants and black defendants.

Petitioner must respectfully dispute the observation of Justice Stevens, joined by Justices Blackmun and Powell, that "it is a sound exercise of discretion for [this] Court to allow the various States to serve as laboratories in which the issue [of racially motivated peremptory challenges] receives further study before it is addressed by this Court." McCray v. New York, _____ U.S. _____ [51 U.S.L.W. 3855, May 31, 1983] (opinion concurring in the denial of certiorari). The problem with that view of Federalism in the context of this case is that the courts of Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee and Virginia have been serving as "laboratories" for the preceding 118 years. Those of us who have defended black persons accused of crime in the South know, beyond any possibility of doubt, that racially motivated exercises of peremptory challenges by the prosecution have historically been utilized as a strategic weapon to gain an unfair tactical advantage over black defendants. The United States Reports are replete with instances in which the criminal justice system of Texas, and the criminal justice systems of those other States that have traditionally discriminated against blacks, have routinely sanctioned this subtle technique for depriving the accused of

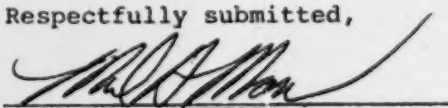
his right to a fair trial by a fair cross-section of his community -- black and white. To suggest that such an established practice of racial discrimination requires further study before being remedied is simply to abdicate responsibility for reviewing acknowledged constitutional deprivations.

The evidence in this record demonstrates a classic prima facie case of systematic exclusion based upon racially discriminatory exercises of peremptory challenges. The prosecution failed to rebut Petitioner's evidence of systematic exclusion or even to deny that racially motivated challenges had been exercised by the chief prosecutor in the present case. In such circumstances the conviction must be reversed.

CONCLUSION

For all of the foregoing reasons, Petitioner Wesley Eric Harris respectfully suggests that his petition for the writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

WESLEY ERIC HARRIS, Appellant

NO. 68,170 v. -- Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for sexual abuse. Punishment was assessed by the trial court at twelve years imprisonment in the Texas Department of Corrections. The appellant contends in five grounds of error that the trial court erred: by overruling the appellant's motion to dismiss the indictment; by charging the jury that it might find appellant guilty merely upon proof that he acted "with intent to arouse sexual desire"; by charging the jury that it might find appellant guilty on the basis of either one or two alleged acts of deviate sexual intercourse, one of which was the subject of a separate count in the indictment which had been abandoned by the State; by admitting into evidence the identification testimony of the complaining witness; and by overruling appellant's motion to dismiss because of the State's systematic exclusion of black persons from the jury panel. Upon careful review of these grounds, we affirm the judgment of the trial court.

The appellant first contends that the indictment is fatally defective because it fails to allege that the appellant acted with intent to arouse the sexual desire of "any person" pursuant to V.T.C.A., Sec. 21.04, which provides:

> "A person commits an offense if, without the other person's consent and with intent to arouse or gratify the sexual desire <u>of any person</u>, the actor . . . ." [emphasis added.]

The indictment in the instant case alleged in pertinent part that the appellant:

> "with intent to arouse sexual desire and by force and threats to and without the consent of M___L___, a person not his spouse and hereafter styled the Complainant, have deviate sexual intercourse with the Complainant by placing his penis in the mouth of the Complainant."

The contention that this indictment omitted an essential element of the offense has been raised and rejected by this Court in Ex parte Cone, 601 S.W.2d 383 (Tex.Cr.App. 1980). The appellant attempts to distinguish Ex parte Cone by arguing that the issue in the instant case was raised in the trial court by his motion to dismiss the indictment as fundamentally defective. Our review of the record indicates, however, that the motion to dismiss was not filed until the second day of trial. Additionally, there is nothing in the record showing a ruling by the trial court on this motion or indicating that it was brought to the court's attention. Under these circumstances, not only has the appellant preserved nothing for review, he has also failed to adequately distinguish the facts of the instant case from those in Ex parte Cone, supra. Viewed in this light, Ex parte Cone, supra, is dispositive of the appellant's contention. The indictment is not fundamentally defective.

The appellant similarly contends that the court's charge to the jury was defective in not requiring the jury to find that the appellant committed the offense with the intent to arouse the sexual desire "of any person." The court's charge applied the law to the facts of the case as follows:

> "Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, WESLEY ERIC HARRIS, in Harris County, Texas, on or about the 29th day of May, 1979, did then and there unlawfully, with intent to arouse sexual desire, and by force or threats to M___L___ of such a degree or nature as hereinbefore set forth, and without the consent of M___L___, a person not his spouse, have deviate sexual intercourse with the said M___L___ by placing his penis in the mouth of the said M___L___, then you will find the defendant guilty of sexual abuse."

Inasmuch as we have held that the omission of the phrase "of any person" in the indictment in the instant case and in Ex parte Cone, supra, is not an omission of an essential element of the offense, it is only logical that such an omission in the court's charge to the jury will not render that charge fundamentally defective. Considered in its entirety, the paragraph of the charge applying the law to the facts herein sufficiently alleges each and every element of the offense and adequately apprised the jury that they must find that the appellant acted with intent to arouse the sexual desire of a person as opposed to that of "an animal, foul or plant." See Ex parte Cone, supra, at 385. This ground of error is overruled.

The appellant further contends that the court's charge to the jury at the guilt phase of the trial authorized a conviction on a theory which had been previously abandoned by the State. The indictment alleged sexual abuse in two separate counts; count one alleging appellant committed deviant sexual intercourse "by placing his penis in the mouth of the complainant" and count two alleging appellant committed deviate intercourse "by placing his penis in the anus of the complainant." At the close of the evidence the State abandoned the second count and elected to proceed on the first count. The court's charge to the jury abstractly defined deviate sexual intercourse as "any contact between any part of the genitals of one person and the mouth or anus of another person." However, in applying the law to the facts of the case the court instructed the jury that, in order to convict the appellant, it must find that the appellant had "deviate sexual intercourse with M___L___ by placing his penis in the mouth of the said [victim]. . ." [emphasis added.] This Court held in Grady v. State, 614 S.W.2d 830 (Tex.Cr.App. 1981) that even though

the abstract statements of the law go beyond the allegations in the indictment, where the charge to the jury unequivocally restricts the jury's consideration as to only those allegations contained in the indictment, the charge will not present reversible error. See also Toler v. State, 546 S.W.2d 290 (Tex.Cr.App. 1977). The charge in the instant case did so restrict the jury's consideration to the allegations in the unabandoned count of the indictment.No error is shown.

The appellant contends that the trial court erred in allowing the victim's in-court identification of the appellant and her testimony as to the lineup conducted prior to trial because such testimony was the fruit of an illegal arrest and detention. We disagree.

A brief recitation of the facts is necessary to our discussion of this ground of error:

The victim was assaulted in the early morning hours of May 28, 1979. Later that morning she made a written statement to the police concerning the assault, in which she described her assailant, the clothes he was wearing and the car he was driving. On June 1, 1979, the appellant was arrested by officers of the Houston Police Department while he was driving a car other than that identified by the victim. At trial one of the arresting officers testified that the arrest was made as the result of information contained in a "crime analysis bulletin" of the police department, indicating that the appellant was wanted in connection with a rape, and that after conferring at the scene of the arrest the officers determined to take him to the police department. On the same day of his arrest the appellant was placed in a police line-up; at that time he was identified by the victim as her assailant.

Prior to trial appellant's counsel filed a motion to suppress in-court identification of the accused, alleging that his arrest and detention were illegal and that the line-up and in-court identification would constitute "illegal exploitation of the primary illegality." A hearing was held and the trial court overruled the motion. Thereafter the victim was allowed to testify in the presence of the jury that the appellant was her assailant and that she had previously identified him at the police line-up.

It is undisputed that the arresting officers took the appellant into custody without a warrant. We need not decide, however, the legality of the arrest and detention, for the in-court identification was admissible, and the admission of the line-up identification, however improper, merely presents harmless error.

The Supreme Court of the United States was presented with facts nearly identical to those in the instant case in United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980). In rejecting a contention similar to that raised herein, the court held that:

> "The parallels between Bynum and this case are apparent: the pretrial identification obtained through use of the photograph taken during respondent's illegal detention cannot be introduced; but the in-court identification is admissible, even if the respondent's argument be accepted, because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation. . . ."

The victim's in-court identification of the appellant as her assailant was shown to be based on her observation of the appellant during the commission of the offense rather than at the police line-up. The victim testified that her identification of the appellant was independent of having seen him at the line-up and

that she would have been able to identify the appellant even if she had not seen him at any time other than at trial and at the time of the assault. The in-court identification was not a fruit of an illegal arrest of the appellant and was properly admitted into evidence. Assuming the admission of the victim's testimony concerning her identification of the appellant at the line-up was error, it is harmless error beyond a reasonable doubt since the in-court identification was admissible. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 684 (1969); and see generally Wyatt v. State, 566 S.W.2d 597 (Tex.Cr.App. 1978). This ground of error is overruled.

The appellant finally contends that the trial court committed reversible error by overruling his motion to dismiss the indictment based on the State's systematic exclusion of black persons from the jury panel. Specifically, the appellant argues that at the hearing held on his motion he established a prima facie case of systematic exclusion of blacks from jury service by establishing that the State historically had utilized its peremptory challenges to exclude black jurors from "virtually every criminal prosecution in Harris County, Texas in which the credibility of a white complaining witness was pitted against a black defendant."

Upon careful examination of the testimony adduced at the hearing on the appellant's motion, it is apparent to us that the State effectively rebutted the appellant's prima facie case and that the evidence, viewed in toto, is conflicting on this issue. Testimony from three assistant district attorneys in Harris County revealed that each had accepted black persons on juries in cases involving black defendants and white victims.

Judge Miron Love, Judge of the 177th District Court, testified that in his extensive tenure on the bench he had observed black persons serving on juries in which defendants were black and the victims white. The appellant's evidence that prosecutors usually exercised peremptory challenges to eliminate blacks from jury panels was rebutted by testimony from the Chief of the Trial Bureau of the District Attorney's office that there was no office policy to strike black persons from jury panels solely on the basis of race.

Systematic exclusion of blacks from jury panels was not sufficiently established by the appellant. See Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). The evidence presented by the appellant was at best inclusive. As trier of fact, the trial court was entitled to resolve the conflicting evidence against the appellant. See generally Burks v. State, 583 S.W.2d 389 (Tex.Cr.App. 1979). The motion to dismiss the indictment was properly denied.

The judgment of the trial court is affirmed.

PER CURIAM

Delivered October 19, 1983

En Banc

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NO. 83-6211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WESLEY ERIC HARRIS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITIONER'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Wesley Eric Harris respectfully moves for leave to proceed in forma pauperis in this case. The affidavit required by 28 U.S.C. section 1915 and Rule 46.1 of this Court accompanies this motion. Petitioner did not seek leave to proceed in forma pauperis in any court below.

Respectfully submitted,

MICHAEL A. MANESS
2000 North Loop West, Suite 123
Houston, Texas 77018
(713) 957-2800

Counsel for Petitioner

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OFFICE OF THE CLERK
SUPREME COURT U S

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TO THE COURT OF CRIMINAL APPEALS OF TEXAS

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

I, WESLEY ERIC HARRIS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor and that I believe I am entitled to redress.

I further swear that the responses which I have made in this Affidavit relating to my ability to pay the costs of this proceeding are true.

I am presently an inmate of the Wynne Unit of the Texas Department of Corrections in Huntsville, Texas. I was last employed at Hermann Hospital in Houston, Texas in November, 1983, where I earned approximately $ 900.00 per month.

I have not received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources of income.

I do not own any cash in any checking or savings account.

I do not own any real estate, any stocks or bonds, notes automobiles or any other valuable property.

I am a single person and have no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

SIGNED this 1st day of February, 1984.

Wesley Eric Harris

WESLEY ERIC HARRIS
Petitioner

THE STATE OF TEXAS

COUNTY OF WALKER

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this 1st day of February, 1984, personally appeared WESLEY ERIC HARRIS, known to me to be the person whose signature is subscribed to the foregoing instrument, who after being by me first duly sworn stated under oath that he has read the foregoing affidavit and that the matters of fact stated therein are true and correct.

W O Shaw

NOTARY PUBLIC IN AND FOR
~~WALKER COUNTY~~, TEXAS

W. O. SHAW
NOTARY PUBLIC - STATE OF TEXAS
MY COMMISSION EXPIRES 6-30-85

ORIGINAL

FILED
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ALEXANDER L. STEVAS
CLERK

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V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

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QUESTION PRESENTED

WHETHER THE STATE SYSTEMATICALLY EXCLUDED BLACKS FROM JURY PANELS THROUGH THE EXERCISE OF PEREMPTORY CHALLENGES?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is unpublished, is reproduced in Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing on December 7, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 182nd Judicial District Court of Harris County, Texas, in Cause No. 297546 styled The State of Texas v. Wesley Eric Harris. Petitioner was charged with the offense of sexual abuse, to which he entered a plea of not guilty. Petitioner was tried by a jury, which on October 29, 1979, found him guilty of the offense charged. The court assessed punishment at imprisonment for twelve (12) years in the Texas Department of Corrections.

Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals en banc on October 19, 1983. Harris v. State, No. 68,170 (Tex.Crim.App., Oct. 19, 1983) (en banc). Petitioner's Motion for Leave to File Motion for Rehearing was denied without written order on December 8, 1983.

B. Statement of Facts

The record reflects that subsequent to the selection of the jurors, Petitioner filed a "Motion to Dismiss Indictment Based on State's Systematic Exclusion of Black Persons from Jury Panel" (Tr. 34, 38). A hearing was held in the trial court (SF 1045-1200) and Petitioner's motion was denied by the trial court.

In addition to the testimony mentioned by Petitioner in his statement of facts in the Petition for Writ of Certiorari, the record reflects the following testimony was adduced at the hearing on the Motion to Dismiss the Indictment. Judge Miron Love, Judge of the 177th District Court of Harris County, testified that in his extensive tenure on the bench he had observed black persons serving on juries in which the defendants were black and the victims white (SF 1045-48). Ken Sparks, an assistant district attorney in Harris County, Texas, testified

that he had accepted black persons on juries on many different occasions (SF 1085). He further testified that the Harris County District Attorney's Office had no policy, pattern or practice of excluding blacks from juries in "sex related" cases where the victim was white and the defendant black (SF 1064-1066). Andy Tobias, another assistant district attorney in Harris County, testified that as a person in a supervisory position within the district attorney's Office he had never advised prosecutors to strike all black persons from jury panels and, further, he testified that he had personally accepted black persons as jurors in cases where the victim was white and the defendant black (SF 1090-1106). Bob Burdette, an assistant district attorney in Harris County, testified that he had participated in trials in which there were black defendants and white victims (SF 1108-09). He stated that he had kept blacks on the jury in such cases, even though he had peremptory challenges available (SF 1109). Ted Busch, Chief of the Trial Bureau in the Harris County District Attorney's Office, testified that he had accepted black persons on the jury in sex related cases where the victim was white and the defendant black on many occasions (SF 1111-1112) and, that on many of those occasions, he had the opportunity to use a peremptory strike but elected not to do so (SF 1114-15). He further testified that he was not aware of any policy, system, pattern or practice in the Harris County District Attorney's Office to utilize peremptory challenges to exclude blacks from juries and that if such existed, he would know about it (SF 1112-13). Veronica Morgan, another assistant district attorney and a witness called by Petitioner, testified that very often in those types of cases blacks were peremptorily excused by the State, but that she had not observed any systematic exclusion of blacks from the jury panel in such cases (SF 1121). Judge Thomas Routt, Judge of the 208th District Court, and a black person himself, testified that in his experience as a judge a

majority of the jury trials over which he had presided had included at least one black person on the jury (SF 1130-31). He estimated that in only five to ten percent of the cases over which he had presided had no black person served on the jury (SF 1130-1133). In contrast, most of the witnesses called by Petitioner to testify that in their experience prosecutors in Harris County, Texas, had generally used peremptory challenges to eliminate black persons from the jury panel in sex related cases involving a black defendant and a white victim were shown to have had exposure to a limited number of trials. Wesley Hocker, a criminal defense attorney, testified that he had tried approximately one hundred cases and only fifteen percent of those cases fit that category (SF 1050-1054). He admitted that he could not testify to a systematic exclusion of jurors in those types of cases in Harris County, but could only testify that in the few cases he had tried that fit that category such exclusion had occurred (SF 1055-1056). Judge Joseph Guarino, Judge of the 183rd District Court, testified to only having observed eight to ten such cases (SF 1073). Jacquelyn Miles, a court reporter, testified to having observed only ten to twelve such cases (SF 1135-1141).

The Texas Court of Criminal Appeals, after careful review of the evidence presented, found that Petitioner had failed to establish systematic exclusion of blacks from jury panels. The court further found that the trial court was entitled, as a matter of state law, to resolve conflicting evidence against Petitioner. Harris v. State, at 6-7.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well settled constitutional principles to the facts involved herein.

Petitioner's claims of intentional and systematic exclusion of blacks from jury service by the prosecutor's use of peremptory challenges should be denied as only questions of evidence and

factual findings are involved. The court below, applying the guidelines of Swain v. Alabama, 380 U.S. 202 (1965) and carefully reviewing the testimony adduced at the hearing on Petitioner's "Motion to Dismiss the Indictment based on State's Systematic Exclusion of Black Persons from Jury Panels", found that Petitioner failed to demonstrate systematic exclusion of Blacks from jury panels through the state's operation of its peremptory system.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner had advanced no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II. THIS COURT PREVIOUSLY DENIED CERTIORARI ON THE SAME QUESTION.

In McCray v. New York, 51 U.S.L.W. 3855 (May 31, 1983), this Court denied a writ of certiorari when the petitioner sought review of the question of whether the state's use of peremptory challenges to exclude potential black jurors because of their race violates criminal defendants' right to an impartial jury drawn from a fair cross-section of the community. In the opinions respecting the denial of the petitions for writ of certiorari, Justices Stevens, Blackmun and Powell wrote:

> I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have held that a criminal defendant's rights under state constitutional provisions are violated in some circumstances by the

> prosecutor's use of peremptory challenges to exclude members of particular racial, ethnic, religious, or other groups from the jury.... That premise, understandably, has given rise to litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges, which has traditionally been final and unreviewable.... In my judgment it is a sound exercise of discretion for the Court to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this court.

Id. (citations omitted)

Petitioner has neither alleged nor demonstrated any conflict within the circuits which has arised since the court's denial of certiorari in McCray. Nor does Petitioner allege any recent action occurring in the state courts. Thus, there have been no significant intervening developments that render the issue presented more worthy of this Court's attention.

III. REVIEW OF PETITIONER'S CLAIM OF INTENTIONAL AND SYSTEMATIC EXCLUSION OF BLACKS SHOULD BE DENIED AS ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The question presented for review relative to Petitioner's claim that blacks were intentionally and systematically excluded from serving on juries because of the prosecutor's pattern and practice of excluding black jurors through the exercise of peremptory challenges does not present a substantial question worthy of this Court's review. Contrary to Petitioner's allegations, the question presented is, in actuality, one of sufficiency of the evidence to prove systematic exclusion of blacks from jury panels. The state trial and appellate courts decided this question adversely to Petitioner.

In Swain v. Alabama, 380 U.S. 202 (1965), the court held that in reviewing the prosecutor's exercise of his peremptory challenges:

> "[T]he presumption in any particular case must be that the prosecutor is using the state's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subject to examination by allegations that in the case at hand all [blacks] were removed from the

> jury or that they were removed because they were [blacks].

380 U.S. at 222. The court noted, however, that such presumption may be overcome by evidence of the government's deliberate and systematic exclusion of blacks from the jury through the state's exercise of its peremptory challenges. 380 U.S. at 225. The burden is on the petitioner to demonstrate by sufficient evidence systematic discrimination of constitutionally significant proportions. 380 U.S. at 225-26.

Applying the Swain guidelines and carefully examining the testimony adduced at the hearing on Petitioner's motion, the Texas Court of Criminal Appeals, en banc, held that Petitioner failed to present sufficient evidence to establish the systematic exclusion of blacks from jury panels through the State's exercise of its peremptory challenges. Harris v. State, at 6-7. The issue presented thus involves nothing more than evidentiary questions and factual determinations made by the state trial and appellate courts. Such questions do not justify the exercise of this Court's certiorari jurisdiction. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
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Chief, Enforcement Division

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ATTORNEYS FOR RESPONDENT-APPELLEE

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PROOF OF SERVICE

I hereby certify that on the 20th day of April, 1984, one copy of the Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Michael A. Maness, 2000 North Loop West, Suite 123, Houston, Texas 77018. All parties required to be served have been served. I am a member of the Bar of this Court.

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

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Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 20th day of April, 1984.

Frank K. Wilhelm

NOTARY PUBLIC in and for
Travis County, T E X A S